A

ANNAMALAY RETNAM

v.

MAH CHONG PENG & ANOR

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
HELILIAH MOHD YUSOF JCA
ABDUL MALIK ISHAK JCA
[CIVIL APPEAL NO: B-04-200-2004]

C

21 JANUARY 2010

CIVIL PROCEDURE: *Appeal - Interference by appellate court - Questions of fact and credibility - Whether appellate court should be slow to interfere*

D

ROAD TRAFFIC: *Negligence - Collision between two vehicles - Liability of parties - Head on collision - Defendant's vehicle encroaching onto plaintiff's path - Sketch plan by police witness - Whether position where broken glass was found would probably indicate point of impact - Whether court able to determine liability*

E

ROAD TRAFFIC: *Negligence - Liability - Defendant charged under s. 43 Road Transport Act 1978 - Whether charge to be taken as admissible admission of liability - Decision in Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu*

F

TORT: *Negligence - Road accident - Liability - Defendant charged under s. 43 Road Transport Act 1978 - Whether charge to be taken as admissible admission of liability - Decision in Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu*

G

TORT: *Negligence - Road accident - Liability - Sketch plan by police witness - Whether position where broken glass was found would probably indicate point of impact*

The plaintiff/appellant claimed that he was travelling on his right of
H way on the left side of the road facing north, from Kuala Lumpur to Ipoh when the defendants'/respondents' motor lorry suddenly emerged from the opposite direction and overtook a motorcar. The motor lorry collided into the plaintiff, as a result of which the plaintiff sustained fracture of his right hand and leg. He was treated
I in the Kuala Lumpur Hospital for about a month. His motorcycle

was drastically damaged. In essence, the plaintiff pleaded in his statement of claim that the defendant had overtaken a vehicle in front of him and encroached onto the plaintiff's proper side of the road and then the collision took place. The plaintiff's police report and pleadings were consistent. His evidence had also established the same version. The sketch plan and the key thereto supported the plaintiff's version that the collision had taken place on the plaintiff's side of the road, as all the glass fragments, blood spots, broken motorcycle parts and the motorcycle were on the plaintiff's side of the road. The investigating officer had caused a summons to be issued by the magistrate's court to the plaintiff under s. 43(1) of the Road Transport Act 1978 ('s. 43(1)') but there was no evidence of its service on the plaintiff. The learned sessions court judge found the defendant wholly liable to the plaintiff. On appeal, the learned High Court judge set aside the sessions court decision and substituted it with an order that there was 80% contributory negligence on the part of the plaintiff and 20% negligence on the part of the defendant. Hence this appeal by the plaintiff.

Held (allowing the appeal with costs):
Per Low Hop Bing JCA (majority)

(1) It was an established principle that the position where the broken glass was found would probably indicate the point of impact. (para 13)

(2) As the evaluation by the trial judge reflected the proper approach, his finding of facts should not have been disturbed by the learned High Court judge sitting in an appellate capacity. The learned High Court judge erred in interfering with the trial judge's finding of facts. (para 15)

(3) The mere preference of a charge under s. 43 against any person does not *per se* empower the Court to treat the charge as an admissible admission by that person. An admission may only be established by a guilty plea. It is elementary that in the absence of a guilty plea, there can be no admission whatsoever. There is a time-honoured presumption of innocence in favour of a person charged with an offence in court, until and unless he elects to plead guilty thereto. Hence, the court disagreed with the decision in *Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu* HC. The learned High Court erred in treating the charge (without any guilty plea) as an admissible admission. (para 30)

A **Per Abdul Malik Ishak JCA (dissenting):**

(1) The learned High Court judge rightly held that the rider of the motorcycle was the author of his own misfortune which was also contributed by the negligence of the driver of the motor lorry. (para 66)
B

(2) If the appellate court is satisfied that the trial court has not taken proper advantage of having seen and heard the witnesses, then the whole matter will be at large and it is open to the appellate court to intervene and right the wrong. There is no
C presumption that the judgment of the trial court is always right. (para 71)

(3) The police report (first information report) was lodged by the driver of the motor lorry (who had since died) some 1 hour 35
D minutes after the accident took place. The learned sessions court judge brushed aside the value of the first information report on the ground that the maker of the said report was not tested by way of cross-examination. The promptness on the part of the driver of the motor lorry in lodging the first information
E report must be given due weight as compared to the delay in lodging the police report by the plaintiff. (paras 80, 81 & 82)

(4) Although the summons under s. 43(1) was unserved, it was still pending and had not been withdrawn. That was relevant and
F admissible evidence which should have been considered by the learned sessions court judge. Had he done so, the apportionment of liability might have been different and it might even be like what the learned High Court judge was inclined to do. The summons bore the hallmarks of culpability
G and negligence. (paras 100 & 110)

(5) The decision in *Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu* was correctly decided. Relevance, admissibility and weight of the evidence dictated the reception of the evidence surrounding the charge under s. 43(1) against the rider of the motorcycle. The
H appeal must therefore be dismissed with costs. (para 122)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif/perayu mendakwa bahawa beliau menunggang di sebelah
I bahagian jalannya yang betul iaitu di sebelah kiri jalan ke arah utara dari Kuala Lumpur ke Ipoh apabila motolori yang dipandu defendan/ responden secara tiba-tiba muncul di hadapannya dan memotong

sebuah kereta. Motolori telah melanggar plaintif berakibat plaintif mengalami kecederaan di tangan dan kaki kanannya. Plaintif dirawat di Hospital Kuala Lumpur selama sebulan sementara motosikalnya rosak teruk. Pada asasnya, plaintif memplid dalam penyataan tuntutannya bahawa defendan telah memotong kenderaan di hadapan defendan dan memasuki bahagian jalan plaintif sekaligus menyebabkan kemalangan berlaku. Pliding plaintif adalah konsisten dengan laporan polisnya. Begitu juga, keterangan yang beliau berikan menyerlahkan versi yang sama. Rajah kasar serta kekuncinya juga menyokong versi plaintif bahawa kemalangan berlaku di sebelah bahagian jalan plaintif, kerana pecahan gelas, tompokan darah, pecahan bahagian-bahagian motosikal serta motosikal kesemuanya berada di bahagian jalan plaintif. Pegawai penyiasat bagaimanapun telah menyebabkan saman dikeluarkan oleh Mahkamah Majistret terhadap plaintif di bawah s. 43(1) Akta Pengangkutan Jalan 1978 ('s. 43'), walaupun tiada keterangan bahawa saman tersebut telah diserah kepada plaintif. Yang arif hakim Mahkamah Sesyen mendapati bahawa defendan bertanggungan sepenuhnya terhadap kemalangan. Di rayuan, yang arif hakim Mahkamah Tinggi telah mengenepikan keputusan Mahkamah Sesyen dan menggantikannya dengan perintah bahawa wujud sumbangan kecuaian, iaitu 80% di pihak plaintif dan 20% di pihak defendan. Plaintif dengan itu merayu.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Low Hop Bing HMR (majoriti):

(1) Adalah menjadi satu prinsip mantap bahawa kedudukan di mana terdapatnya pecahan-pecahan gelas mungkin menunjukkan tempat perlanggaran berlaku.

(2) Oleh kerana penilaian oleh hakim bicara mencerminkan pendekatan yang betul, dapatan fakta yang dibuat oleh beliau tidak seharusnya diganggu di peringkat rayuan oleh yang arif hakim Mahkamah Tinggi. Yang arif hakim Mahkamah Tinggi khilaf bilamana campurtangan dalam dapatan fakta hakim bicara.

(3) Hanya dengan suatu pertuduhan di bawah s. 43 dibuat terhadap mana-mana orang, tidak memberikan mahkamah kuasa untuk menganggap pertuduhan itu sebagai satu pengakuan oleh orang tersebut yang boleh diterima-masuk. Pengakuan hanya boleh didasarkan kepada suatu pengakuan bersalah. Adalah menjadi

perkara asas bahawa tanpa pengakuan bersalah maka tidak akan ada apa-apa pengakuan. Juga, sejak sekian lama, wujud anggapan tidak bersalah terhadap seseorang yang dituduh dengan suatu kesalahan di mahkamah, kecuali dan sehingga beliau memilih untuk membuat pengakuan bersalah. Oleh itu mahkamah ini tidak bersetuju dengan keputusan Mahkamah Tinggi di dalam *Tabarani Mohd Arsad & Anor v Chan Tenn Yeu*. Yang arif hakim Mahkamah Tinggi khilaf dalam menganggap pertuduhan (tanpa sebarang pengakuan bersalah) sebagai satu pengakuan yang boleh diterima-masuk.

Oleh Abdul Malik Ishak HMR (menentang):

(1) Yang arif hakim Mahkamah Tinggi betul apabila mendapati bahawa penunggang motosikal adalah penyebab kepada nasib malang yang menimpanya, tetapi wujud sumbangan kecuaian di pihak pemandu motolori.

(2) Jika mahkamah rayuan berpuashati bahawa manfaat melihat dan mendengar saksi-saksi telah tidak diambil peluang sewajarnya oleh mahkamah bicara, maka keseluruhan kes menjadi terbuka untuk diteliti semula dan mahkamah rayuan berhak untuk campurtangan bagi membetulkan kesilapan. Tiada anggapan bahawa keputusan mahkamah bicara adalah sentiasa betul.

(3) Laporan polis (laporan maklumat pertama) telah dibuat oleh pemandu motolori (yang telah meninggal dunia) lebih kurang 1 jam 35 minit selepas kemalangan berlaku. Yang arif hakim Mahkamah Sesyen tidak mempedulikan peri pentingnya laporan maklumat pertama itu atas alasan bahawa pembuatnya tidak diuji pada pemeriksaan balas. Kecepatan pemandu lori dalam membuat laporan polis harus diberikan nilai sewajarnya berbanding kelewatan plaintif dalam membuat laporan polisnya.

(4) Walaupun saman di bawah s. 43(1) tidak diserahkan, ia masih lagi wujud dan tidak ditarik balik. Itu adalah sesuatu yang relevan dan merupakan keterangan boleh diterima-masuk yang seharusnya dipertimbang oleh yang arif hakim Mahkamah Sesyen. Sekiranya beliau berbuat demikian, mungkin pembahagian liabiliti akan berbeza, dan malah mungkin selaras dengan apa yang diputuskan oleh yang arif hakim Mahkamah Tinggi. Saman telah memperlihatkan kebersalahan dan kecuaian.

(5) *Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu* telah diputuskan dengan betulnya. Kerelevanan, kebolehterimaan-masuk dan keberatan keterangan menjurus kepada penerimaan keterangan di sekitar pertuduhan di bawah s. 43(1) terhadap penunggang motosikal. Dengan itu rayuan harus ditolak dengan kos.

Case(s) referred to:

A Perianayagam & Anor v. Yeo Suan Tin & Anor [1984] 1 LNS 15 HC ***(refd)***

Abdul Wahab Kachi Mydin v. Gan Ah Hoe [1977] 1 LNS 3 HC ***(refd)***

Another v. Probert [1968] Crim LR 564 ***(refd)***

Anthony Gomez v. Ketua Polis Daerah Kuantan [1977] 1 LNS 89 FC ***(refd)***

Benmax v. Austin Motor Co, Ltd [1955] 1 All ER 326 ***(refd)***

Bensley v. Smith [1972] Crim. LR 239 ***(refd)***

Chang Chong Foo & Anor v. Shivanathan Perumal [1992] 4 CLJ 1939; [1992] 1 CLJ (Rep) 27 SC ***(refd)***

Chock Kek Ling v. Patt Hup Transport Co Ltd & Ors [1965] 1 LNS 25 HC ***(refd)***

Choo Kok Beng v. Choo Kok Hoe & Ors [1984] 1 LNS 40 PC ***(refd)***

Clarke v. Edinburgh & District Tramways Co Ltd [1919] SC (HL) 35 ***(refd)***

Coghlan v. Cumberland [1898] 1 Ch 704 ***(refd)***

Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung & Anor Appeal [1997] 3 CLJ 189 CA ***(refd)***

Director of Public Prosecutions v. Kilbourne [1973] AC 729 ***(refd)***

Foong Nan v. Sagadevan [1971] 1 LNS 33 FC ***(refd)***

Hasib v. The State of Bihar [1972] CRI LJ 233 ***(refd)***

Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC ***(refd)***

Hollington v. F Hewthorn And Company, Limited, And Another [1943] 1 KB 587 ***(refd)***

Karumalay Vanniyan & Anor v. Ananthan Rethinam [2005] 2 CLJ 429 CA ***(refd)***

Lai Yew Seong v. Chan Kim Sang [1987] 1 CLJ 351; [1987] CLJ (Rep) 151 SC ***(refd)***

Lee Ewe Teik v. Ariffin Hussain [1990] 2 CLJ 191; [1990] 2 CLJ (Rep) 332 HC ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 ***(refd)***

Liddon v. Stringer [1967] Crim. LR 371 ***(refd)***

Lim Ah Ton v. Ang Yan Chee & Anor [1969] 2 MLJ 194 ***(refd)***

Loh Chee Keong v. Syarikat Bee Huat Sdn Bhd & Anor [1981] 1 LNS 128 HC ***(refd)***

MA Clyde v. Wong Ah Mei & Anor [1970] 1 LNS 73 FC ***(refd)***

McCrone v. Riding [1938] 1 All ER 157 ***(refd)***

Multar Masngud v. Lim Kim Chet & Anor [1982] CLJ 107; [1982] CLJ 237 FC ***(refd)***

Mundi v. Warwickshire Police [2001] EWHC Admin 448 ***(refd)***

Muthusamy v. PP [1947] 1 LNS 71 HC ***(refd)***

O'Connell v. Fraser [1963] 107 SJ 95 ***(refd)***
Othman Ahmad lwn. Samsudin Hj Mohd Sani & Yang Lain [1992] 3 CLJ 1366; [1992] 1 CLJ (Rep) 529 HC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(refd)***
PP v. Foong Chee Cheong [1969] 1 LNS 128 HC ***(refd)***
PP v. Teh Cheng Poh [1979] 1 LNS 82 HC ***(refd)***
Pratt v. Bloom [1958] Crim LR 817 ***(refd)***
R v. Bristol Crown Court Ex p. Jones (Glyn); Jones v. Briston Crown Court [1986] RTR 259 ***(refd)***
R v. Harz, R v. Power [1966] 3 All ER 433 ***(refd)***
R v. Lawrence [1981] 1 All ER 974 ***(refd)***
R v. Turner [1975] 1 All ER 70 ***(refd)***
Sepang Omnibus Sdn Bhd v. Christina Loh Soo Pang & Ors [1970] 1 LNS 145 FC ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***
Spencer v. Silvester [1963] 107 SJ 1024 ***(refd)***
State of Rajasthan v. Hanuman AIR [2001] SC 282 ***(refd)***
Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1998] 4 CLJ 538 HC ***(refd)***
Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu [1999] 3 CLJ 188 HC ***(refd)***
Tajuddin Sheikh Daud v. Wong Kim Yin [1989] 2 CLJ 237; [1989] 2 CLJ (Rep) 546 HC ***(refd)***
Taylor v. Rogers [1960] 124 JP 217 ***(refd)***
Tek Chand v. Dile Ram AIR [2001] SC 905 ***(refd)***
Watts v. Carter (Note) [1971] RTR 232 ***(refd)***
Woolmington v. Director of Public Prosecutions [1935] AC 462 ***(refd)***
Yahaya Mat & Anor v. Abdul Rahman Abu [1982] CLJ 68; [1982] CLJ (Rep) 363 FC ***(refd)***
Yusoff Kassim v. PP [1992] 3 CLJ 1535, [1992] 1 CLJ (Rep) 376 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 107(1)
Evidence Act 1950, ss. 3, 5, 59, 60, 104, 136(1), (2), (3)
Road Transport Act 1987, ss. 43(1), 68(3)
Road Transport (Amendment) Act 1999, s. 9

Evidence Act [Ind], ss. 145, 157

Other source(s) referred to:
Mallal's Criminal Procedure, 5th edn, paras 4152, 4154
The Journal of Criminal Law, 1954, vol XVIII, pp 204, 205

For the plaintiff/appellant - Brijnandan Singh Bhar (Shailender Bhar with him); M/s G Dorai & Co
For the defendants/respondents - Anantharajah Shanmugam; M/s Azim, Tunku Farik & Wong

Reported by Amutha Suppayah

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] Parties are referred to in their capacities as in the trial court, ie, the sessions court. The trial concerns a motor vehicle accident. The learned sessions court judge ("the trial judge") found the defendant wholly liable to the plaintiff ("the sessions court decision").

[2] On appeal, the learned High Court judge set aside the sessions court decision, and substituted it with an order that there was 80% contributory negligence on the part of the plaintiff and 20% negligence on the part of the defendant ("the High Court decision").

[3] This is the plaintiff's appeal against the High Court decision. It revolves around the issue of liability only. Heliliah bt Mohd Yusof JCA (now FCJ) and I had, by a majority, allowed the appeal, set aside the High Court decision and affirmed the sessions court decision. Abdul Malik Haji Ishak JCA delivered a dissenting judgment.

[4] We now give the grounds of the majority judgment.

Factual Background

[5] The trial judge's finding of facts may be unfolded in the following narrative.

[6] The accident occurred on 8 December 1995.

[7] In his police report, the plaintiff stated that he was on his right of way on the left side of the road facing north, from Kuala Lumpur to Ipoh. On approaching the Serendah Emkay Golf Course, the defendants' motorlorry bearing registration no. ABM 7059 suddenly emerged from the opposite direction and overtook a motorcar, the registration number of which the plaintiff could not remember. The motorlorry collided into the plaintiff, as a result of which the plaintiff sustained fracture of his right hand and leg. He was treated in the Kuala Lumpur Hospital for about a month. His motorcycle was drastically damaged.

[8] In essence, the plaintiff pleaded in his statement of claim that the defendant has overtaken a vehicle in front of him and encroached onto the plaintiff's proper side of the road and then the collision took place.

[9] The plaintiff's police report and pleadings were consistent. His evidence has also established the same version, ie, the defendants' motorlorry overtook a motorcar and collided into him on his side of the road.

[10] The sketch plan and the key thereto supported the plaintiff's version that the collision had taken place on the plaintiff's side of the road, as all the glass fragments, blood spots, broken motorcycle parts and the motorcycle are on the plaintiff's side of the road.

[11] In his evidence, the investigating officer described the damage to the plaintiff's motorcycle as "tayar hadapan pecah dan bocor, fork depan bengkok, roda depan bengkok, handle depan bengkok, lampu besar depan pecah dan pecah lampu belakang" ("front tyre was broken and leaking, front fork was bent, front wheel, front handle, front headlight and rear lamp were broken").

[12] The investigating officer also testified that the front right mudguard of the motorlorry was scratched and slightly dented. The broken glass is from the headlight and the tail light of the plaintiff's motorcycle.

Plaintiff's Version

[13] Having regard to the plaintiff's police report, pleading, and evidence, as well as the investigating officer's sketch plan and the key thereto, in particular the markings in relation to the broken glass, the trial judge had justifiably accepted the plaintiff's version as more probable. It is an established principle that the position where the broken glass was found would probably indicate the point of impact: per Abdoolcader J (later SCJ) in *Yahaya bin Mat & Anor v. Abdul Rahman bin Abu* [1982] CLJ 68; [1982] CLJ (Rep) 363 FC; and per VC George J in *Loh Chee Keong v. Syarikat Bee Huat Sdn Bhd & Anor* [1981] 1 LNS 128 HC.

[14] The trial judge has also correctly evaluated the evidence of the parties, in line with the approach set out by Richard Malanjum JCA (now CJ(SS)) for this court in *Karumalay Vanniyan & Anor v. Ananthan Rethinam* [2005] 2 CLJ 429 at 447 a-b which in turn

followed the decision of this court delivered by Gopal Sri Ram JCA (now FCJ) in *Lee Ing Chin @ Lee Teck Seng & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19, 33 c-d to the effect, *inter alia*, that "A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons either accepting or rejecting the whole or any part of the evidence placed before him." At the same page d-e, his Lordship continued: "He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case."

[15] As the evaluation by the trial judge reflects the proper approach, his finding of facts should not have been disturbed by the learned High Court judge sitting in an appellate capacity: See *Commercial Union Assurance (M) Sdn Bhd v. Ng Chek Hung & Anor Appeal* [1997] 3 CLJ 189 CA per Gopal Sri Ram JCA (now FCJ), following *Clarke v. Edinburgh Tramways Co.* [1919] SC 35 at p. 36 per Lord Shaw (HL). In our view, the learned High Court judge has erred in interfering with the trial judge's finding of facts.

Liability In Overtaking Moving Vehicles

[16] The liability arising from the overtaking of moving vehicles has been well illustrated in:

(1) *Abdul Wahab bin Kachi Mydin v. Gan Ah Hoe* [1977] 1 LNS 3 HC: The driver of the car overtaking cyclists or trishaws going onto the wrong half of the road and colliding into an on-coming motorcyclist was held solely negligent;

(2) *Tajuddin Sheikh Daud v. Wong Kim Yin* [1989] 2 CLJ 237; [1989] 2 CLJ (Rep) 546 HC: The driver of the car overtaking another car and colliding into an on-coming motorcycle was held wholly to blame;

(3) *Lee Ewe Teik v. Ariffin Hussain* [1990] 2 CLJ 191; [1990] 2 CLJ (Rep) 332 HC: The motorcyclist overtaking a lorry and colliding into another lorry from the opposite direction was held totally to blame;

(4) *Lai Yew Seong v. Chan Kim Sang* [1987] 1 CLJ 351; [1987] CLJ (Rep) 151: The motorcyclist who was not keeping a proper lookout and overtaking a motorcar when unsafe to do so was held totally to blame;

(5) *Sepang Omnibus Sdn Bhd v. Christina Loh Soo Pang & Ors* [1970] 1 LNS 145 FC: The driver of a military truck overtaking without regard to on-coming traffic was held solely to blame for colliding into an on-coming taxi;

(6) *Othman Ahmad lwn. Samsudin Hj Mohd Sani & Yang Lain* [1992] 3 CLJ 1366; [1992] 1 CLJ (Rep) 529: The driver of a small lorry which suddenly emerged at great speed from behind a motorcar to overtake it and colliding with an on-coming motorcycle was held totally to blame;

(7) *Foong Nan v. Sagadevan* [1971] 1 LNS 33 FC: A motorcar overtaking a cyclist and going onto wrong side was held solely responsible; and

(8) *Multar Masngud v. Lim Kim Chet & Anor* [1982] CLJ 107; [1982] CLJ (Rep) 237 FC; *Choo Kok Beng v. Choo Kok Hoe & Ors* [1984] 1 LNS 40: The driver of a timber lorry which grazed a motorcycle while overtaking it was held wholly to blame.

Charge Under s. 43(1)

[17] This is the final issue raised in the instant appeal. The investigating officer has caused a summons to be issued by the magistrate's court to the plaintiff under s. 43(1) of the Road Transport Act 1978 ("s. 43(1)"). The summons was sent by post, but there was no acknowledgment of receipt (AR) card. Hence, the plaintiff did not turn up in court and a warrant was issued for his arrest. However, the warrant could not be executed as the plaintiff could not be contacted at the given address. There was no evidence of service of the summons on the plaintiff.

[18] Mr Brijnandan Singh Bhar (assisted by Mr Shailender Bhar) submitted for the plaintiff that a charge under s. 43(1) by itself is not admissible, unless the plaintiff had pleaded guilty to the charge, but even that can be explained away.

[19] Learned counsel Mr Anantharajah Shanmugam responded that the trial judge should have considered the charge under s. 43(1) against the plaintiff as an admissible admission, on the basis of s. 68(3) of the Road Transport Act 1987 ("s. 68(3)") and *Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu* [1999] 3 CLJ 188 HC.

[20] In the instant appeal, the learned High Court judge applied *Tabarani Mohd Arsad, supra,* and held that the charge against the plaintiff was an admissible admission.

[21] Under this head, the question for determination is whether a charge under s. 43(1) preferred against a person involved in a motor vehicle accident, in the absence of any guilty plea by him, is an admissible admission against that person.

[22] We would first consider s. 68(3) which reads as follows:

> (3) Failure on the part of any person to observe any provisions of the highway code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings, whether civil or criminal, be relied on by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.

[23] Upon a proper perusal of s. 68(3), we are unable to see any iota of relevance to the contention raised for the defendant, or the question for determination herein. Section 68(3) does not relate to the preference of a charge against any person in court or his guilty plea. What it does say is that a person's failure to observe any provision of the highway code does not of itself render that person to any form of criminal proceedings but such failure may, eg, in civil proceedings be relied on by any party to the proceedings as tending to establish or negative any liability which is in question in those proceedings. That being the case, s. 68(3) is of no assistance to the defendant.

[24] Next, the motor vehicle accident in *Tabarani Mohd Arshad, supra*, reveals a charge of careless and inconsiderate driving under s. 43, but the outcome of the charge was not known as there was no material in the appeal record. Abdul Malik Ishak J (now JCA), also a member of the instant panel, accepted the charge under s. 43 as an admissible admission which weighs against the plaintiff bearing in mind that the charge under s. 43 must have been instituted with the concurrence of the Deputy Public Prosecutor.

A His Lordship drew an analogy from two High Court judgments delivered by Raja Azlan Shah J (now HRH the Sultan of Perak) *viz Chock Kek Ling v. Patt Hup Transport Co. Ltd & Ors* [1965] 1 LNS 25; and *Lim Ah Ton v. Ang Yan Chee & Anor* [1969] 2 MLJ 194.

B

[25] Our reading of *Chock Kek Ling*, *supra*, leads us to the following passage:

> Evidence was brought to show that the fourth defendant had **pleaded guilty** to driving without due care and attention in respect
C of the accident. Although this was not conclusive evidence of the fourth defendant's negligence, it is an admissible admission which supports the plaintiff's case and which weighed against the fourth defendant: see *Noor Mohamed v. Palanivelu* [1956] MLJ 114. (emphasis added).

D

[26] In *Lim Ah Toh, supra*, the pertinent portion of the judgment at p. 196 reads:

> The **plea of guilty** by the first defendant to a **charge of** inconsiderate driving is an admissible admission which further
E supports the plaintiff's case and which weighs against the defendants: see *Noor Mohamed v. Palanivelu* [1956] MLJ 11; *EA Long v. Wong Chin Wah* [1957] MLJ 165. (emphasis added).

[27] The above passages in *Chock Kek Ling*, *supra*; and *Lim Ah Toh, supra*, respectively have been approved by the (then) Supreme Court
F through the judgment of Harun Hashim SCJ in *Chang Chong Foo & Anor v. Shivanathan Perumal* [1992] 4 CLJ 1939; [1992] 1 CLJ (Rep) 27 where the evidence of the plea of guilty by the defendant to a charge of dangerous driving was admitted as evidence. The (then) Supreme Court also held that it was proper for the learned
G judge to admit the evidence of the plea of guilty by the defendant therein.

[28] We note that in *Tabarani Mohd Arsad, supra*, the charge was preferred, but significantly, there was no evidence of any guilty plea.
H At the risk of repetition, at p. 196 of the law report, the judgment reads: "We do not know as to the outcome of the charge levied against the respondent plaintiff as there was no material available in the appeal record."

I

[29] On the other hand, in *Chock Kek Leng, supra*; and *Lim Ah Toh, supra*, the respective charges were coupled with a guilty plea in each case. In the circumstances, the facts were readily distinguishable from those in *Tabarani Mohd Arsad, supra*. It is abundantly clear to us that to constitute an admissible admission, two essential elements must be present *viz.* (1) charge and (2) guilty plea, but not otherwise.

[30] It is trite law that the mere preference of a charge under s. 43 (or for that matter any criminal charge) against any person does not per se empower the court to treat the charge as an admissible admission by that person. An admission may only be established by a guilty plea. It is elementary that in the absence of a guilty plea, there can be no admission whatsoever. Harking back to first principles, there is a time-honoured presumption of innocence in favour of a person charged with an offence in court, until and unless he elects to plead guilty thereto. There is also a gold thread in the administration of criminal justice that the burden of proof is on the prosecution to prove its case beyond reasonable doubt: *Woolmington v. Director of Public Prosecutions* [1935] AC 462 HL. Hence, with the utmost respect, we disagree with the decision in *Tabarani Mohd Arsad, supra.* We are unable to say that it has been correctly decided.

[31] Reverting to the instant appeal, we are of the view that the learned High Court judge sitting in an appellate capacity and following *Tabarani Mohd Arsad, supra*, has also erred in treating the charge (without any guilty plea) as an admissible admission.

Conclusion

[32] On the foregoing grounds, by a majority, we held that the sessions court decision is correct, but not the High Court decision. We therefore allowed this appeal with costs and affirmed the sessions court decision. Deposit to be refunded to the plaintiff.

Abdul Malik Ishak JCA (dissenting):

Introduction

[33] This appeal arose out of a motor vehicle accident that took place on 8 December 1995 at about 7.30pm and it revolved on the issue of liability only.

[34] The learned sessions court judge gave judgment to the plaintiff appellant (Annamalay a/l Retnam), the rider of motorcycle bearing registration number ACB 3979, and held that the defendants respondents (Mah Chong Peng and Ng Say Long) were wholly liable for the road accident. The first defendant respondent (Mah Chong Peng) was the driver of motor lorry bearing registration number ABM 7059. On appeal, the learned High Court judge reversed the finding of liability and substituted it by apportioning liability against the plaintiff appellant at 80% and against the defendants respondents at 20%. Aggrieved by that decision, the plaintiff appellant appeals to this court.

Hearing Before The Sessions Court

[35] The hearing started on 22 May 2001 with the evidence of the assistant investigating officer sergeant 66138 Abdul Halim bin Chin (SP1). SP1 gave evidence for the plaintiff appellant. This was followed by the evidence of the plaintiff appellant himself (SP2). Finally, Ramachandran a/l Sivasamy (SP3) who was the plaintiff appellant's former employer gave evidence for the plaintiff appellant. With that, the plaintiff appellant closed his case. The learned counsel for the defendants respondents then informed the court that the first defendant respondent had passed away on 7 February 1999. The death certificate was tendered and it can be seen at p. 153 of the appeal record. According to the learned counsel for the defendants respondents, no witness would be called to testify for the benefit of the defendants respondents and that the defendants respondents would file the death certificate and a letter confirming the charge against the plaintiff appellant. The learned counsel for the defendants respondents then applied for another date. The learned counsel for the plaintiff appellant agreed and the learned sessions court judge adjourned the matter to 18 June 2001 for further submission.

[36] On 18 June 2001, the matter came up, once again, before the learned sessions court judge. Again, the learned counsel for the defendants respondents emphasised that the first defendant respondent had passed away. The death certificate of the first defendant respondent was put in bundle "F" and the police report of the first defendant respondent was marked as exh. "D5". The learned counsel on both sides then proceeded to make their submissions. The decision of the learned sessions court judge was

reserved until 3 July 2001. On that date, the decision was announced which prompted the defendants respondents to launch an appeal to the High Court judge.

The Evidence Of SP2 – The Plaintiff Appellant

[37] In his examination-in-chief, this was what the plaintiff appellant testified before the sessions court.

[38] On 8 December 1995, he was riding a motorcycle bearing registration number ACB 3979 from Rawang towards the direction of Ipoh. He was alone at that time. There was no pillion rider. The weather on that day was fine. The sketch plan (exh. P1) and the key (exh. P1k) were referred to by SP2 even though they were non-agreed documents and they can be seen at pp. 118 and 119 of the appeal record respectively. In relation to the sketch plan, he said that he was travelling from the bottom to the top. He said that he was riding the motorcycle on lane "B" to "C" of the sketch plan. He said that his speed was 60 kilometres per hour. And that he was about 4 feet from the left side of the road from point "B" of the sketch plan. He said that the motor lorry that collided into him came from the opposite direction.

[39] He said that the accident occurred when the motor lorry overtook and then collided into his motorcycle. He said that the motor lorry overtook a motorcar in front of it proceeding in the same direction. He said that the accident at point "X" as seen in the sketch plan (that point "X" was marked by him on the sketch plan). After the collision, he fell to the left side. His motorcycle also fell to the left side.

[40] He said that during the collision, his motorcycle was grazed on the front right side. The motor lorry was grazed on the front right of the driver's side. The motor lorry overtook and entered his lane from a distance of only 7 metres. When he saw that the motor lorry was overtaking, he swerved to the left.

[41] After the accident, he was immediately sent to the Kuala Kubu Bharu hospital. His right leg was amputated in the month of July 1999. At that time, he was already married and had three children. His wife was unemployed at that time. She was a housewife. He agreed that he carried the financial burden of his family.

[42] He lodged his police report on 1 March 1996 at about 11.10am and calculated from the date of the accident which was on 8 December 1995, the delay in lodging his police report was two months and 23 days. That police report of the plaintiff appellant can be seen at p. 114 of the appeal record and it was worded as follows:

> Pada jam lebih kurang 2000 hrs (8.00 malam) 8/12/1995 saya berlepas daripada Rawang dengan menunggang Motosikal No: ACB 3979 seorang diri hendak balik ke rumah saya di Ladang Sungai Gapi Serendah Hulu Selangor, melalui jalan Ipoh-Kuala Lumpur. Pada jam lebih kurang 2030 hrs (8.30 malam) 8/12/1995 apabila saya sampai Km berapa tidak tahu berdekatan dengan Golf Serendah (EMKAY) saya berada di laluan saya di sebelah kiri jalan hala ke Utara tiba-tiba datang sebuah Motor Lori No: ABM 7059 dari arah hadapan iaitu pada masa itu Motor Lori tersebut sedang memotong sebuah Motokar yang nombor tidak tahu dan tidak lepas dan terus langgar saya yang berada di sebelah kiri jalan hala ke Utara. Saya mengalami patah tangan dan kaki kanan dan dirawat di Hospital Kuala Lumpur selama lebih kurang satu bulan. Motosikal saya ada rosak dan kerugian belum tahu lagi. Dan inilah saya datang Balai buat lapuran Polis. Sekian, lapuran saya.

[43] In essence what he said in his police report was repeated by him in his examination-in-chief.

[44] The plaintiff appellant's delay in lodging his police report was not explained by him. Since there was no explanation for the delay, the correct approach to deal with this kind of police report was lucidly explained by Siti Norma Yaakob J (later Chief Judge of Malaya) in *A. Perianayagam & Anor. v. Yeo Suan Tin & Anor* [1984] 1 LNS 15; [1984] 1 MLJ 214, at p. 215, in this way:

> ... he lodged his report, ie, two weeks after he was discharged from hospital and more than three weeks after the accident. No reason was given for this delay but in cases of this nature, such delay has the effect of making victim like PW2 wiser after the event and he is liable to manufacture facts to hide the true state of affairs.

[45] In personal injury actions, like the present appeal at hand, evidence will be led in open court where witnesses would be examined, cross-examined and re-examined. Statutory wise, ss. 59 and 60 of the Evidence Act 1950 would support this proposition. Section 59 talks of proof of facts by way of oral evidence while s. 60 states that oral evidence must be direct. Thus, police reports

made by the parties after the whole events are over that would give rise to causes of action usually contain statements that describe the manner of their occurrence.

[46] Now, under cross-examination, this was what the plaintiff appellant testified. That day he was on his way home after visiting Rawang town. He admitted that he met his friends at Rawang town. But he denied that he drank liquor on that day. He then said that he was alone on that day and that he was not with his friends. He disagreed with the suggestion that he was riding the motorcycle near the centre white line. He also disagreed with the suggestion that on that day, he was riding the motorcycle with another friend who was also riding another motorcycle to his left. He agreed that the point marked "X" in the sketch plan was located along the road facing Ipoh. To a question that if he were riding the motorcycle four feet from point "B" in the sketch plan and swerved to the left, how could the accident occurred at point "X" in the sketch plan, he replied that the motor lorry encroached into his lane. He disagreed to a question that prior to swerving to the left to point "X" in the sketch plan, he was riding the motorcycle near to the centre white line. He denied that he did not make any attempt to avoid the accident. It was put to him and he denied that he had encroached into the lane of the motor lorry and collided into the said motor lorry. It was also put to him and he denied that after the motorcycle which he rode collided into the motor lorry on the motor lorry's side of the road, his motorcycle which he rode then returned to his side of the road and there he fell.

[47] He said that he gave his statement to the police. His police report was then referred to and he said that he no longer stayed at Ladang Sungai Gapi. He said that he moved two months after the accident. He said that when he lodged the police report he was still staying at Ladang Sungai Gapi.

[48] He testified that he did not receive any summons from the police.

[49] It was put to him and he disagreed that on that day his speed exceeded 60 kilometres per hour. It was also put to him and he disagreed that the motor lorry did not overtake any motor vehicle. It was then put to him and he disagreed that point "X" in the sketch plan was not the place of the collision with the motor lorry but it was the place where his motorcycle fell after colliding with the motor lorry.

[50] He testified that his leg was amputated in July 1999 on the advice of a doctor. He agreed that he met two specialists namely Dr. Low and Dr. Teo. But he testified that these two specialists did not advise him to amputate his leg.

[51] The rest of the cross-examination of the plaintiff appellant centred on the issue of quantum which for the purpose of the present appeal they are irrelevant.

[52] The re-examination was also concerned about the issue of quantum.

The Evidence Of SP1 – Sergeant 66138 Abdul Halim bin Chin (The Assistant Investigating Officer)

[53] On 8 December 1995, he testified that he was on duty at the Serendah police station as an assistant investigation officer in charge of traffic. He was holding that post for the last four (4) years. He testified that he investigated a road accident case involving report number 1906/1995, Hulu Selangor traffic. The vehicles involved were a motor lorry bearing registration number ABM 7059 and a motorcycle bearing registration number ACB 3979. He testified that he went to the scene of the accident on 8 December 1995 at about 9.30pm. He too testified that he drew the rough sketch plan of the place of the accident together with the key thereto. He then identified the rough sketch plan and the key thereto and they were marked as exhs. P1 and P1K respectively.

[54] In relation to the sketch plan, he testified that from the bottom to the top would be from Ipoh to Kuala Lumpur. And that when he arrived at the scene of the accident, he saw the said motorcycle together with the broken pieces of the body frame of the said motorcycle as shown in the sketch plan. He testified that at that time the motor lorry was not at the scene of the accident.

[55] He examined the motor lorry in question. He found that the right front mudguard was scratched and a little bit dented ("mudguard depan kanan ada calar dan kemek sedikit"). He too found the front tyre of the motorcycle was broken and leaking, front fork bent, front wheel bent, front handle bent, front head light and rear light were broken ("tayar hadapan pecah dan bocor, fork depan bengkok, roda depan bengkok, handle depan bengkok, lampu besar depan pecah dan pecah lampu belakang").

[56] According to his investigation, the motorcycle was travelling from the direction of Kuala Lumpur to Ipoh and that would be from the bottom to the top of the sketch plan. While the motor lorry was from Ipoh to Kuala Lumpur and that would be from the top to the bottom of the sketch plan.

[57] Under cross-examination, he testified that the photographer took photographs at the scene of the accident. He said that there were six photographs taken at the scene of the accident while three photographs were taken at the police station. He testified that he did not know whether the motorcycle was moved after the accident.

[58] Still under cross-examination, he said that no photographs were taken of the motor lorry at the scene of the accident. Five photographs were shown to him and he said that these five photographs were related to the road accident in the present case. These five photographs were taken by lance corporal 116954 Ganesan. He then said that the photographs of the motor lorry were taken on the road in front of the Serendah police station. The five photographs were agreed and they were marked as exhs. P2A to P2E.

[59] He said that the first information report was lodged by the driver of the motor lorry.

[60] He said that the police report lodged by the rider of the motorcycle was on 1 March 1996. And that after the rider of the motorcycle had lodged his police report, he found that a summons was issued against the rider of the motorcycle under s. 43(1) of the Road Transport Act 1987. The summons was issued on 4 November 1996. But the rider of the motorcycle did not attend court and a warrant of arrest was issued against him. He testified that the warrant of arrest was not served because Kuala Kubu Bharu traffic police was unable to meet the rider of the motorcycle at the address given by him. He, however, testified that the rider of the motor cycle was present during the hearing before the learned sessions court judge as the trial judge.

[61] Under re-examination, he said that there was no independent witness in this case. He said that the summons sent to the plaintiff appellant was sent by way of a registered post and that there was no acknowledgment of receipt on the A.R. card by the rider of the motorcycle. According to him, the available evidence pertained to

A the police reports, the sketch plan, photographs and the statements of the driver of the motor lorry and the rider of the motorcycle. The decision was based on the available evidence and as a result of his investigations. But he did not elaborate as to what kind of decision he was referring to.

B

The Evidence Of SP3 – Ramachandran a/l Sivasamy

[62] He was the former employer of the plaintiff appellant and his evidence centred on the quantum of damages claimed by the plaintiff appellant. For purposes of the present appeal, SP3's
C evidence was not relevant.

The Evidence Of The Defendants Respondents

[63] The driver of the motor lorry died on 7 February 1999 before
D the date of the hearing on 22 May 2001 before the sessions court. Calculation wise the driver of the motor lorry died two years three months and 15 days before the hearing was heard before the learned sessions court judge.

[64] The defendants respondents case hinged on the police report
E lodged by the driver of the motor lorry together with the charge under s. 43(1) of the Road Transport Act 1987 that was still pending against the driver of the motorcycle – the plaintiff appellant herein.

F **[65]** The version of the road accident by the driver of the motor lorry as reflected in his police report was put to the rider of the motorcycle by way of cross-examination.

Analysis

G

[66] I agree with the decision of the learned High Court judge in setting aside the decision of the learned sessions court judge on the issue of liability. The learned High Court judge rightly held that the rider of the motorcycle was the author of his own misfortune
H which was also contributed by the negligence of the driver of the motor lorry. According to the case of *Benmax v. Austin Motor Co., Ltd* [1955] 1 All ER 326, HL, where there is no question of the credibility of witnesses but rather the sole question revolves on the proper inference to be drawn from specific facts, the appellant court
I is in as good a position to evaluate the evidence as the trial judge and should form its own independent opinion while giving weight to

the opinion of the trial judge. The learned High Court judge did not shirk from the duty of evaluating the evidence just like what the learned sessions court judge did and arrived at the right decision.

[67] The learned High Court judge considered the evidence and the submissions of the parties before arriving at the correct decision in regard to the issue of liability. This was what the learned High Court judge said at p. 16 of the appeal record:

> Perayu (1), pemandu motor lori ABM 7059 tidak dipanggil untuk memberi keterangan bagi pihak Defendan kerana beliau telah meninggal dunia pada 7.2.1999. Kes pihak Perayu/Defendan bergantung semata-mata kepada fakta bahawa Responden/Plaintif telah menghadapi pertuduhan di bawah Akta Pengangkutan Jalan 1987 (ms 80 Rekod Rayuan) dan berasas kepada Laporan polis yang dibuat oleh Defendan 1 iaitu, H/Selangor Report No. 1906/95 pada 8.12.1995, (ms 72 Rekod Rayuan).

[68] After reproducing the police report of the driver of the motor lorry, the learned High Court judge had this to say at pp. 17 to 18 of the appeal record:

> Hujah Peguam Perayu, berasas kepada kerosakan motor lori dan kerosakan motorsikal yang dialami akibat dari kemalangan ini, tidak mungkin perlanggaran berlaku seperti yang diceritakan oleh Responden. Pegawai Penyiasat (SP1) telah memberi keterangan (m.s. 47-48 Rekod Rayuan) bahawa kerosakan motor lori adalah seperti berikut, iaitu, 'mudguard kanan ada calar dan kemek sedikit' berbanding dengan kerosakan motorsikal, iaitu, 'tayar hadapan pecah dan bocor, fork depan bengkok, roda depan bengkok, handle depan bengkok, lampu besar depan pecah dan pecah lampu belakang'. Menurut Peguam Perayu kerosakan-kerosakan kepada kenderaan yang terlibat jelas tidak selaras dengan kemalangan di antara dua kenderaan yang bertembung dalam arah bertentangan tetapi adalah lebih selaras dengan keadaan motorsikal Responden menggesel motorlori Perayu, dan seterusnya, motorsikal Responden telah terjatuh ke hadapannya.
>
> Hujah Peguam Perayu lagi, HMS dalam membuat keputusannya, selain tidak mengambil kira kerosakan-kerosakan kenderaan-kenderaan, telah juga tidak mengambil kira kepada pertuduhan yang telah dihadapkan terhadap Responden tetapi telah hanya memberi perhatian kepada serpihan badan motorsikal, topi keledar, kasut dan kesan darah yang diakui kesemuanya berada di laluan Plaintif. Menurut Peguam Perayu tidak mungkin tempat 'X' yang ditanda oleh Responden merupakan tempat pertembungan (point of impact) tetapi merupakan tempat di mana motorsikal Responden terjatuh setelah motorsikal Responden tergesel dengan motor lori Perayu.

A Dalam hal sedemikian, Peguam Perayu menghujah kemalangan ini turut disumbang oleh Responden dan memohon supaya Mahkamah ini mengenepikan perintah HMS dan memutuskan liabiliti diagihkan 50:50 di antara pihak Perayu dan pihak Responden.

B **[69]** In considering the evidence of the rider of the motorcycle, the learned High Court judge had this to say at pp. 18 to 19 of the appeal record:

Kes Responden pula ialah pada hari dan masa yang berkenaan dia menunggang motorsikalnya No. ACB 3979 dari arah Rawang
C menuju ke Ipoh dan sedang memandu di lorong 'B'-'D' di dalam Rajah Kasar 'P1' dalam kelajuan 60 kmj lebih kurang 4 kaki daripada tepi kiri jalan.

Responden berkata sebuah motor lori yang datang dari arah yang bertentangan telah memotong sebuah kenderaan lain yang berada di
D hadapan motor lori tersebut dan telah masuk ke laluannya dan telah melanggarnya. Menurut Responden bahagian hadapan kanan motorsikalnya telah melanggar bahagian hadapan kanan motor lori Perayu. Menurut Responden apabila motor lori Perayu masuk ke dalam laluannya dia telah cuba mengelak ke kirinya tetapi tidak berjaya untuk mengelakkannya. Akibat pertembungan yang telah
E berlaku, motorsikalnya telah tercampak ke kiri jalan. Keterangan Responden ini adalah selaras dengan laporan polis yang dibuat oleh Responden (Ekshibit 'P4' m.s. 73 Rekod Rayuan).

Dalam pemeriksaan balas Responden menafikan dia telah
F menunggang motorsikalnya hampir dengan garisan putih di tengah jalan. Menurut Responden tempat pertembungan berlaku adalah di tempat di mana ditanda sebagai 'X' di dalam Rajah Kasar Ekshibit 'P1'.

Dalam keadaan ini Peguam Responden menghujah HMS tidak
G tersilap apabila dia memutuskan pihak Perayu bertanggungjawab 100% atas kemalangan ini dan memohon supaya rayuan Perayu ditolak dengan kos dan keputusan HMS dikekalkan.

[70] Finally, in assessing the available evidence from the cold print
H of the appeal record, the learned High Court judge aptly said at pp. 19 to 20 of the appeal record:

Setelah menimbang hujahan kedua belah pihak, dan keterangan yang direkodkan serta dokumen yang dibentangkan, pihak Perayu telah meyakinkan saya bahawa HMS tersilap apabila dia memutuskan
I pihak Perayu bertanggungjawab 100% atas kemalangan ini. Saya berpendapat pihak Responden adalah lebih bertanggungjawab terhadap kemalangan yang telah berlaku.

Saya bersetuju dengan hujahan Peguam Perayu bahawa HMS tersilap kerana tidak mengambil kira pertuduhan yang telah dihadapkan terhadap Responden di bawah seksyen 43(1) Akta Pengangkutan Jalan 1984. Setelah meneliti kerosakan kedua-dua kenderaan yang dialami akibat dari kemalangan ini saya bersetuju dengan hujahan Peguam Perayu bahawa tidak mungkin kemalangan ini berlaku seperti yang diceritakan oleh Responden. Dengan mengambil kira kerosakan-kerosakan kenderaan yang terlibat di dalam kemalangan ini saya bersetuju versi Perayu seperti yang terkandung di dalam laporan polisnya adalah lebih kemungkinan dan tidak seperti yang diceritakan oleh Responden. Saya juga bersetuju bahawa tidak mungkin pertembungan berlaku di tempat yang ditanda 'X' oleh Responden.

Dengan yang demikian rayuan atas isu liabiliti telah dibenarkan dengan kos. Keputusan HMS bertarikh 27.8.1998 berhubung dengan liabiliti adalah diketepikan dan sebaliknya memerintahkan liabiliti dibahagikan seperti berikut, 20% di atas Perayu dan 80% atas Responden.

[71] Now, the advantages enjoyed by the learned sessions court judge as the trial judge are known to all appellate courts. The trial judge had the advantage of seeing and hearing the witnesses. While the appellate court only has before it the written transcript of the witnesses in cold print. If the appellate court is satisfied that the trial court has not taken proper advantage of having seen and heard the witnesses, then the whole matter will be at large and it is open to the appellate court to intervene and right the wrong. We must always bear in mind that there is no presumption that the judgment of the trial court is always right.

[72] This court in the joint judgment of Gopal Sri Ram and Mahadev Shankar JJCA in *Sivalingam Periasamy v. Periasamy & Anor.* [1996] 4 CLJ 545, aptly said at p. 550:

It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[73] Their Lordships, at p. 551, continued as follows:

> Again, in *Onnasis & Anor v. Vergottis* [1968] 2 Lloyds Rep. 403, 430, Lord Pearce dissenting speech contains the following valuable reminder:
>
> > The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or a miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of the wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of their respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant may in the end fail to secure a judgment in his favour. But the fact that the right party seems to have succeeded in the Court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

[74] Lindley MR in *Coghlan v. Cumberland* [1898] 1 Ch. 704, CA, at pp. 704 to 705, made the following germane observations which I adopt gratefully:

> Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.

[75] Edgar Joseph Jr SCJ in *Yusoff bin Kassim v. Public Prosecutor* [1992] 3 CLJ 1535, [1992] 1 CLJ (Rep) 376, aptly said: A

> We recognised that the learned trial Judge had a great advantage, denied to this Court, of seeing and hearing the witnesses and the appellant testify. Be that as it may, there is a wealth of authority for the proposition that upon an issue depending upon oral evidence where there is plainly perjury on the one side or the other, a Court of Appeal ought to be greatly influenced by the opinion of the trial Judge, who has seen and heard the witnesses, except where he has failed to observe inconsistencies or to take account of material circumstances or probabilities. (See for example, *Khoo Sit Hoh & Ors. v. Lim Thean Tong* [1912] AC 93). An appellate Court can, therefore, in appropriate cases, act upon its own view of the conflicting evidence. (See *Coghlan v. Cumberland* [1898] 1 Ch D 704; and *Bigsby v. Dickenson* [1976] 4 Ch D 24). B C
>
> In all the circumstances, having regard to the fact that the trial Judge had overlooked or failed to take into account or given proper weight to, or drawn proper inferences, from the matters to which we have adverted, which otherwise might have caused him to come to a different conclusion, we were satisfied that he had not taken proper advantage of his having seen and heard the witnesses (per Lord Thankerton in *Watt Or Thomas v. Thomas* [1947] AC 484) and so the present appeal came within the range of those cases where we were at liberty to act upon our own view of the conflicting evidence. D E

[76] D.P. Mohapatra J, in the *State of Rajasthan v. Hanuman* AIR [2001] SC 282, at p. 284, said: F

> No doubt the appellate Court should assess the evidence on record with a view to satisfy itself that the appreciation of evidence by the trial Court is not vitiated on account of any erroneous approach or illegality and it is not palpably erroneous. The sustainability of the judgment depends on the soundness of the reasons given in support of the findings and the conclusion. G

[77] Shivaraj V. Patil J, in *Tek Chand v. Dile Ram* AIR [2001] SC 905, at p. 916, said: H

> No doubt, an appeal Court will be slow in disturbing a finding of fact recorded by the trial Court based on proper appreciation of evidence but it is also the duty of the appellate Court to disturb it if the burden of proof is not discharged by cogent, positive and acceptable evidence in the light of law laid down by this Court. More so when there is non consideration of material evidence and appreciation of evidence is not objective and one sided. I

[78] Lord Shaw of Dunfermline in *Clarke v. Edinburgh & District Tramways Co Ltd* [1919] SC (H.L.) 35, at pp. 36 to 37, aptly said:

> When a Judge hears and sees witnesses and makes a conclusion or inference with regard to what is the weight on balance of their evidence, that judgment is entitled to great respect, and that quite irrespective of whether the Judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the Judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a Court of justice. In Courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate Court? In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the Judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the Judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

[79] All these statements of the law reflect the duty of an appellate court where findings of fact of the trial court should be reviewed. All material evidence must be taken into account and should not be swept under the carpet. In short, the non-consideration of material evidence and the failure to appreciate the evidence objectively would invite appellate interference.

[80] Acknowledging the importance of these salient principles of law, I now turn my attention to the police report lodged by the driver of the motor lorry. That police report was lodged on 8 December 1995 at about 9.05pm – some 1 hour 35 minutes after the road accident took place. That first information report can be seen at p. 113 of the appeal record and it was worded as follows:

> Pada jam lebih kurang 7.30 malam 8/12/1995 saya berlepas dari Bidor, Perak mahu pergi ke Singapura dengan memandu Motor Lori No: ABM 7059 bersama seorang kawan. Pada jam lebih kurang 8.45 malam 8/12/1995 semasa saya melalui Jalan Kuala Lumpur Ipoh km berapa tidak tahu berhampiran Ladang Sg. Gapi Serendah di mana pada masa itu saya lihat ada dua buah Motosikal dari arah Kuala Lumpur ke Ipoh dengan keadaan yang mana terhoyong hayang masuk memakan jalan saya dan saya mengelak ke kiri dari melanggar Motosikal tersebut di mana sebuah telah lepas manakala sebuah lagi telah melanggar Motor Lori saya dan kena pada bahagian hadapan sebelah kanan pemandu. No. Motosikal tersebut ACB 3979. Motor Lori saya tiada mengalami apa-apa rosak dan saya serta kawan saya tiada mengalami apa-apa kecederaan. Inilah saya datang ke Balai buat pengaduan.

[81] The first information report initiated investigation and it illustrated the manner in which the accident had occurred and it was admitted as evidence during the trial. The learned sessions court judge brushed aside the value of the first information report on the ground that the maker of the said report was not tested by way of cross-examination. This was what the learned sessions court judge said in regard to the first information report of the driver of the motor lorry (see p. 102 of the appeal record):

> Walaupun laporan polis defendan boleh diterima masuk sebagai keterangan di bawah seksyen 73A tersebut namun keterangan tersebut tidak patut sangat diberikan pertimbangan oleh kerana ianya tidak diuji dalam soal balas.

[82] It must be emphasised that the first information report triggers investigation where more salient evidence will be unfolded. The promptness on the part of the driver of the motor lorry in lodging the first information report must be given due weight as compared to the delay in lodging the police report by the rider of the motorcycle – the plaintiff appellant herein.

[83] Ong Hock Thye CJ (Malaya) in *Herchun Singh & Ors. v. Public Prosecutor* [1969] 1 LNS 52; [1969] 2 MLJ 209, FC, had occasion to consider the issue of the first information report. At p. 211 of the report, this was what his Lordship had to say:

> As regards omissions in the first information report, we would endorse Sohoni's commentary on section 154 of the *Indian Criminal Procedure Code* (16th Edition, Vol. I, page 750), which is similar to section 107 of our Criminal Procedure Code, as follows:

> It is a mistake to believe that a person cannot be the accused unless his name appears in the first information report. The provisions of the Code lay down no such stipulation. All that is required for purpose of this section is that there should be clear, definite information about the commission of a cognizable offence to set the investigation machinery in motion. Further, the information required need not contain the circumstances of the commission of the offence, nor the names of the offenders or the witnesses, for the main purpose of investigation is to ascertain these matters. ... The first information report is not an Encyclopaedia. It is not the beginning and ending of every case. It is only a complaint to set the affairs of law and order in motion. It is only at the investigation stage that all the details can be gathered and filled up. But it cannot be said that omissions in the first information report would always be of no significance. The report is not substantive evidence and omissions in it will not *ipso facto* lead to the case being thrown out. But it is a piece of corroborative evidence; omissions in it will, other things being the same, deprive the prosecution of the most valuable corroboration and thereby make the story suspicious.
>
> When a first information report contains an omission as to an important fact relied upon by the prosecution, the omission is important and in the absence of any other evidence, the court may in a given case refuse to consider the evidence of the informant on that fact because of such omission. For a correct appraisal of the effect of omission as contradicting the informant it is essential to keep in view the circumstances in which the report was lodged.
>
> For instance, an omission in a report hurriedly lodged under the press of events should not have the same significance as one in a report lodged after cool calculation.
>
> In short, it is wrong to hold up the first information report as a sure touchstone by which the complainant's credit may invariably be impeached. It can only be used for that purpose with discrimination, in much the same way as previous statements by the witness are used, so that irrelevant errors in detail are not given exaggerated importance nor omissions, objectively considered in the light of surrounding circumstances.

[84] A first information report need not be reduced in writing. It may orally be made to a police officer and the investigations that follow are perfectly legal. The respondent in *Public Prosecutor v. Foong Chee Cheong* [1969] 1 LNS 128 was charged for extortion.

The complainant made an oral report to the police inspector at the police station and for want of time, the oral report was not reduced into writing. The police inspector without wasting time took RM10 note from the complainant and signed on it and gave it back to the complainant to be given to the respondent. The police inspector directed his police personnel to go to the scene of the crime in the complainant's motor van to witness the complainant giving that marked RM10 note to the respondent. Upon arrival, the police personnel saw the complainant gave that marked RM10 note to the respondent and the police personnel then arrested the respondent. Gill J (as he then was) dealt with the issue of the first information report in this way:

> The learned magistrate acquitted the accused without calling on his defence on the ground, first, that as the report of PW1 had not been reduced into writing in the first instance the police had no power to act and that, consequently, the arrest of the accused was void in law; secondly, that the only evidence that could corroborate the evidence of PW1 was that of PW2 who, being an employee and a relative of PW1, was very much an interested party.
>
> With respect to the learned magistrate, he was wrong in acquitting the respondent on each of the grounds which he has mentioned in his grounds of judgment. However important a document a first information report is, it can never be treated as a piece of substantive evidence and the fact that no first information report was made is not in itself a ground for throwing out a case. The powers of the police to investigate do not depend solely on Chapter XIII of the Criminal Procedure Code. The duties of a police officer as set out in section 20 of the Police Act, 1967 include apprehending all persons whom he is by law authorised to apprehend and these duties are amplified in section 23 of the Criminal Procedure Code. Most of these duties imply a power to investigate whether there has been an information under section 107 of the Criminal Procedure Code or not. (See *Vellasamy v. Rex* [1941] MLJ 233, 236).
>
> In the present case, a first information report was in fact made, but it was made orally. The inspector to whom it was made quite clearly thought that if any time was wasted in reducing the report into writing; reading it back to the informant and getting his signature, the accused might disappear from the canteen before any steps could be taken to apprehend him. Quite rightly, therefore, he took immediate action to have two detectives sent with PW1. When PW1 returned to the police station after the accused had been arrested, his report was formally reduced into writing. As

A investigations had already commenced before such report was reduced into writing, it became inadmissible in evidence as a first information report but it was still possible for it to be used to impeach the credit of the person making it under section 113(ii) of the Criminal Procedure Code, so that it could not be said that the accused was deprived wholly of the opportunity to cross-examine PW1 on it.

B

It is true that generally the absence of a first information report casts a cloud of suspicion and tends to weaken the prosecution case. But as was pointed out by their Lordships of the Privy Council in *Emperor v. Khwaja Nazir Ahmad* AIR [1945] PC 18, 20, the receipt and recording of an information report is not a condition precedent to the setting in motion of a criminal investigation. Lord Porter in delivering the judgment of the Privy Council in that case went on to say:

C

D

> No doubt in the great majority of cases, criminal prosecutions are undertaken as a result of information received and recorded in this way but their Lordships see no reason why the police, if in possession through their own knowledge or by means of credible though informal intelligence which genuinely leads them to the belief that a cognisable offence has been committed, should not of their own motion undertake an investigation into the truth of the matters alleged … In truth the provisions as to an information report (commonly called a first information report) are enacted for other reasons. Its object is to obtain early information of alleged criminal activity, to record the circumstances before there is time for them to be forgotten or embellished, and it has to be remembered that the report can be put in evidence when the informant is examined if it is desired to do so.

E

F

[85] The delay in lodging a police report would invite criticisms in that the said report would be construed as an embellishment because there is time to reflect and to concoct. Thus, promptitude in lodging a police report is highly recommended. And such promptness cannot be said in regard to the police report lodged by the rider of the motorcycle in question.

G

H

[86] Again, in the case of *M.A. Clyde v. Wong Ah Mei & Anor.* [1970] 1 LNS 73; [1970] 2 MLJ 183, FC, Gill FJ had this to say about the first information report in that case (see pp. 184 to 185 of the report):

I

I am therefore satisfied that the report was made before any investigation took place. In the circumstances, the police report was clearly a first information report and not a statement in the course of police investigation, so that the two cases relied upon for its rejection are wholly inapplicable. A

On the assumption that the police report was a first information report, it was contended by counsel for the appellants, on the authority of *State of Gujarat v. Hiralal Devji* AIR [1964] Gujarat 261, that it was not substantive evidence and could only be used to corroborate or contradict the maker of that report. The short answer to that is that the provisions of the Criminal Procedure Code do not apply to a civil action. In my judgment if a first information report contains an admission which is relevant to a claim in a civil action against him, it is admissible in evidence under sections 17, 18 and 21 of the Evidence Ordinance, 1950. I find support for this from the decision in *Bishen Das v. Ram Labhaya* AIR [1916] Lahore 133, with which I respectfully agree, and which went so far as to say that though an admission of guilt made by a defendant to a police officer is not receivable in evidence as a 'confession' as against him if he is on his trial as an accused person, yet it is acceptable in a civil suit as an admission under sections 17, 18 and 21 of the Evidence Act. The admission, of course, cannot be regarded as conclusive, and it is open to the person who made it to explain it away, which was not done in this case. B C D E

[87] The non-production of the first information report became an issue in the case of *Public Prosecutor v. Teh Cheng Poh* [1979] 1 LNS 82; [1980] 1 MLJ 251, and this was how Gunn Chit Tuan J (as he then was) handled the issue (see p. 254 of the report): F

Counsel also referred to the case of *Tan Cheng Kooi & Anor. v. Public Prosecutor* [1972] 2 MLJ 115 in which it was held *inter alia* by Chang Min Tat J (as he then was) that where the case against the accused depended entirely on the evidence of the complainant, the failure to produce the first information report would deprive the accused of an opportunity to cross-examine his accuser, and which would raise the presumption under section 114(g) of the Evidence Act, 1950 that the report would be unfavourable to the prosecution case. His Lordship, therefore, held that as the evidence against the appellants in that case came entirely from the complainant, the conviction of the accused could not be upheld. In this case, Mr. Karpal Singh argued that PW2 was the complainant and that his first information report should have been produced. With respect, I was of the view that strictly speaking the person who could be considered the complainant in this case was not PW2, but Cpl. G H I

> 11950 (PW1) who, having received the emergency call from a male Chinese who did not give his name, then made the first information report. Moreover, in this case the prosecution did not depend entirely on the evidence of PW2, who was not the complainant, and the failure to produce any report by him, if there was one, could not also in my judgment raise any presumption under the said section 114(g) of the Evidence Act, 1950.

[88] The right of inspection of the first information report under the common law was granted to the applicant in the case of *Anthony Gomez v. Ketua Polis Daerah Kuantan* [1977] 1 LNS 89; [1977] 2 MLJ 24, FC At p. 25 of the report, Suffian LP (delivering the judgment of the Federal Court) had this to say:

> In our judgment the applicant has a right to inspect the first information report and therefore the O.C.P.D. should have given him a certified true copy. The applicant has a right to inspect the first information report under the common law because of his interest in it.

[89] What is the main object of the first information report from the point of view of the informant? It is to put in motion the investigation to be carried out by the police. It must be emphasised that the first information report does not constitute substantive evidence but its importance regarding the occurrence of an event cannot be doubted. And according to the case of *Hasib v. The State of Bihar* [1972] CRI LJ 233, SC, it can only be used as a previous statement for the purpose of either corroborating its maker under s. 157 of the Indian Evidence Act or for the purpose of contradicting the maker under s. 145 of the Indian Evidence Act. But the first information report cannot be used to corroborate or contradict other witnesses.

[90] In the context of s. 107(1) of the Criminal Procedure Code, the word "information" means "something in the nature of a complaint or accusation or at least information of a crime, given with the object of putting the police in motion in order to investigate, as distinguished from information obtained by the police when actively investigating a crime" (see *Mallal's Criminal Procedure* (5th edn), paras 4152 and 4154), and this very passage was cited by Augustine Paul J (later FCJ) in *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 CLJ 215. A caveat must be imposed here. It is this. That the provisions of the Criminal Procedure Code do not apply to a civil action.

[91] Be that as it may, of significance would be the failure on the part of the learned sessions court judge in not considering the unrebutted fact that the plaintiff appellant – the rider of the motorcycle, was summoned to face a charge in the Magistrate's court under s. 43(1) of the Road Transport Act 1987. And as alluded to earlier the summons was unserved and the Magistrate's court issued a warrant for the arrest of the plaintiff appellant. Unfortunately, even the warrant of arrest could not be executed because the plaintiff appellant has moved house. The summons is still pending and it has not been withdrawn. Must we sweep all these facts under the carpet and pretend that no evidence was led on these facts. Was the learned sessions court judge entitled to ignore these facts and proceed to adjudicate the matter nonchalantly – blissfully ignoring these facts? In my judgment, they are relevant evidence that cannot be ignored.

[92] Lord Simon of Glaisdale in *Director of Public Prosecutions v. Kilbourne* [1973] AC 729, at p. 756, HL, expressed the view that:

> Evidence is relevant if it is logically probative or disprobative of some matter which requires proof. I do not pause to analyse what is involved in 'logical probativeness,' except to note that the term does not of itself express the element of experience which is so significant of its operation in law, and possibly elsewhere. It is sufficient to say, even at the risk of etymological tautology, that relevant (ie, logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable.

[93] Relevance is certainly a threshold criterion. The fundamental condition of admissibility of evidence is its relevancy. What is relevant is admissible and what is irrelevant is inadmissible. In *Hollington v. F. Hewthorn And Company, Limited, And Another* [1943] 1 KB 587, CA, at p. 594, Lord Goddard aptly said that:

> But, nowadays, it is relevance and not competency that is the main consideration, and, generally speaking, all evidence that is relevant to an issue is admissible, while all that is irrelevant is excluded.

[94] Questions of admissibility of evidence are certainly questions of law for the judge to decide. The most important condition of admissibility is the issue of relevance. Section 3 of the Evidence Act 1950 defines the word "relevant" as:

> One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to relevancy of facts.

[95] In *R v. Harz., R. v. Power* [1966] 3 All ER 433, CA, at p. 449, Thesiger J, aptly said:

> (i) The main general rule governing the entire subject is that evidence which is sufficiently relevant to an issue before the court is admissible and all that is irrelevant or insufficiently relevant should be excluded. (*Cross On Evidence* (2nd Edn.) pages 12-13). The word 'relevant' is used in the sense in which it is defined in article 1 of *Stephen's Digest Of The Law Of Evidence* (12th Edn.). It is there stated that the word
>
> > means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connexion with other facts proves or renders probable the past ... existence ... of the other.
>
> Thus the word 'relevant' is to all intents and purposes synonymous with the phrase 'of probative value'.

[96] Section 5 of the Evidence Act 1950 lays down the rule that evidence may be given only of facts in issue and other facts declared by this Act to be relevant and of no others. This section must be read with s. 136 of the Evidence Act 1950. Sub-section (1) of s. 136 of the Evidence Act 1950 empowers the judge to ask the party proposing to give evidence of any fact in what manner the alleged fact, if proved, would be relevant. As I said earlier that admissibility is a question of law for the court to decide and sub-section (1) of s. 136 of the Evidence Act 1950 states that the judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise (*Muthusamy v. Public Prosecutor* [1947] 1 LNS 71).

[97] Sub-section (2) of s. 136 of the Evidence Act 1950 states that where the evidence of a fact is admissible only upon proof of some other fact, such last mentioned fact must be proved first unless the party undertakes to give proof of such fact and the court is satisfied with such an undertaking. It is ideal to read this sub-section (2) of s. 136 of the Evidence Act 1950 with s. 104 of the same Act.

[98] While sub-section (3) of s. 136 of the Evidence Act 1950 stipulates that where the relevancy of one fact depends upon proof of another fact, the court has the full discretion to allow either fact to be proved first.

[99] So it can be surmised that relevant evidence is *prima facie* admissible on the basis that its admission will promote the aims of the law of evidence. But there are exceptions to this rule as reflected in *R v. Turner* [1975] 1 All ER 70, CA. There at p. 74, Lawton LJ had this to say:

> Relevance, however, does not result in evidence being admissible: it is a condition precedent to admissibility. Our law excludes evidence of many matters which in life outside the courts sensible people take into consideration when making decisions. Two broad heads of exclusion are hearsay and opinion.

[100] Having to answer a summons in the Magistrate's court under s. 43(1) of the Road Transport Act 1987 with the consequent result that it was unserved and eventually a warrant of arrest was issued against the plaintiff appellant which could not be executed because the plaintiff appellant has moved house are relevant and admissible evidence which should be considered by the learned sessions court judge. Sadly he did not. Had he done so, the apportionment of liability might have been different and it might even be like what the learned High Court judge was inclined to do. Even the first information report of the first defendant respondent was not given due weight. Justice has not been seen to be done here. And I must intervene in order to correct the injustice.

[101] Now, after relevance and admissibility, weight is another fundamental concept of the law of evidence. In the evaluation of the relevant evidence the weight to be attached to that relevant evidence is of equal importance. Once it has been decided that the first information report is relevant to the facts in issue and that it is admissible in law then an appropriate weight should be given to it by the learned sessions court judge. But sad to say he merely regurgitated the contents of the first information report and finally brushed it aside since the maker was not scrutinised by way of cross-examination.

[102] When the adjudicator decides on the weight of the evidence, he is said to be estimating the degree to which the evidence does affect the probability of a fact in issue. In my judgment, the contents of the first information report of the first defendant respondent driver of the motor lorry was not incredible and due weight must be given to it.

[103] It is now ideal to refer to s. 43 of the Road Transport Act 1987 bearing in mind that the road accident took place on 8 December 1995 at about 7.30pm. That section is worded as follows:

> **Careless and inconsiderate driving**
>
> 43 (1) A person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence and shall on conviction be liable to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding six months.
>
> (2) The court shall, (unless for any special reason it thinks fit to order otherwise), order particulars of any conviction under this section to be endorsed on any driving licence held by the person convicted.
>
> (3) On a second or subsequent conviction under this section, the court shall exercise the power conferred by this Part ordering that the offender shall be disqualified from holding or obtaining a driving licence unless the court having regard to the lapse of time since the date of the previous or last previous conviction or for any other reason (which reason shall be stated in the order), thinks fit to order otherwise, but this provision shall not be construed as affecting the right of the court to exercise the power aforesaid on a first conviction.
>
> (4) Notwithstanding subsection (1), where a person who is a holder of a probationary driving licence is convicted under this section, the court shall revoke his driving licence.

[104] Section 43(1) of the Road Transport Act 1987 was amended on 2 September 1999 by way of Act A1065 *vide* Road Transport (Amendment) Act 1999 where s. 9 thereto stipulates as follows:

> 9. Subsection 43(1) of the principal Act is amended by substituting for the words 'liable to a fine not exceeding two thousand ringgit or to imprisonment for a term not exceeding six months' the words 'punished with a fine of not less than four thousand ringgit and not more than ten thousand ringgit and shall also be liable to imprisonment for a term not exceeding twelve months.

[105] For the present exercise, I am only concerned with the sentencing prior to the amendment of s. 43(1) of the Road Transport Act 1987 by way of Act A1065.

[106] Driving without due care and attention or without reasonable consideration for other persons using the road are synonymous with careless and inconsiderate driving. The test as to whether a person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road is an objective one (*McCrone v. Riding* [1938] 1 All ER 157). Essentially, the test is that of the reasonable, prudent and competent driver. It is a question of fact. Thus, if the person who drives a motor vehicle fails to exercise due care, he is guilty whether or not his failure is due to his inexperience *(McCrone v. Riding (supra))* and whether or not it was a deliberate act or an error of judgment (*Taylor v. Rogers* [1960] 124 JP 217).

[107] It was held in *R. v. Bristol Crown Court Ex p. Jones (Glyn); Jones v. Briston Crown Court* [1986] RTR 259 that a driver suddenly confronted by an emergency should not be judged by hindsight; the test in such circumstances as to whether he is guilty of careless driving is, "Was it reasonable for him to have acted as he did?". The facts of the case were that the defendant was driving an articulated lorry at 52 to 57 miles per hour on a motorway at night when all his lights suddenly failed without warning. He immediately pulled onto the hard shoulder and had the misfortune of colliding with an unlit parked vehicle of which he could not have been aware. His conviction was accordingly quashed on the ground that his action was reasonable in the circumstances.

[108] A person is guilty of careless driving once it is proved that he has departed from the required standard of driving. It matters not whether this was due to his negligence, incompetence, inexperience, recklessness, or even his deliberate intent. According to Lord Diplock in *R v. Lawrence* [1981] 1 All ER 974, HL, at p. 981, that the only *mens rea* required in a case of careless driving is "simply that the prohibited physical act *(actus reus)* done by the accused was directed by a mind that was conscious of what his body was doing, it being unnecessary to show that his mind was also conscious of the possible consequences of his doing it."

[109] Whether a person should be convicted under s. 43(1) of the Road Transport Act 1987 is primarily a question of fact and not of law. Some examples of careless driving are as follows:

(a) Mounting the verge and hitting a pole nearly 3 feet from the edge of the road is *prima facie* evidence of careless driving, unless explained, for example a skid (*Watts v. Carter (Note)* [1971] RTR 232).

(b) When a driver signals that he will turn right and then he turns left without taking any precautions to see if anything is coming behind is guilty of careless driving (*Pratt v. Bloom* [1958] Crim. LR 817).

(c) A motorist who edged from a park to a road when his view was obstructed by parked vehicles was held to be liable and his conviction upheld (*O'Connell v. Fraser* [1963] 107 SJ 95).

(d) A driver who gave misleading signals that he was going to turn but did not in fact turn was held guilty of careless driving (*Another v. Probert* [1968] Crim. LR 564).

(e) When a car was driven at 25 miles per hour past an obscured halt sign and although the driver must have seen the white lines to mark the junction, he failed to see a car on the main road and he was convicted for careless driving (*Spencer v. Silvester* [1963] 107 SJ 1024).

(f) Crossing a central white line is itself evidence of careless driving in the absence of an explanation (*Bensley v. Smith* [1972] Crim. LR 239; and *Mundi v. Warwickshire Police* [2001] EWHC Admin 448).

(g) A driver who was reading a newspaper while driving was likened to a driver who kept kissing his passenger and he was convicted of careless driving (*The Journal of Criminal Law*, [1954] vol. XVIII, at pp. 204 and 205).

(h) A driver of a bus who is reversing and relying on his conductor's signals must satisfy himself that the conductor is so positioned that he can see what he ought to see and if the conductor is not so positioned and an accident occurs, the driver may be guilty of careless driving (*Liddon v. Stringer* [1967] Crim. LR 371).

[110] If only the learned sessions court judge considered all these authorities, he would have appreciated that the summons in the Magistrate's court under s. 43(1) of the Road Transport Act 1987

that culminated in the warrant of arrest being issued against the plaintiff appellant as the rider of the motorcycle bear the hallmarks of culpability and negligence and he would have assessed liability just like what the learned High Court judge did.

[111] *Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu* [1999] 3 CLJ 188 was a road accident case which was decided by me when I was on the High Court bench. At p. 195 of the report, this was what I said:

> The trial court believed and accepted the version of the motorcyclist without testing the discrepancies in the evidence of the respondent plaintiff with the mute evidence together with the evidence of Inspector Chung Seng Yung (SP2) to the effect that the respondent plaintiff was charged under section 43 of the Road Transport Act 1987 for careless and inconsiderate driving. We do not know as to the outcome of the charge levied against the respondent plaintiff as there was no material available in the appeal record. By way of an analogy, Raja Azlan Shah J (as His Majesty then was) in *Chock Kek Ling v. Patt Hup Transport Co Ltd & Ors* [1966] 1 MLJ 120, 121 gave some weight to the evidence of pleading guilty to driving without due care and attention as an admissible admission and this was what his Majesty said:
>
> > Evidence was brought to show that the fourth defendant had pleaded guilty to driving without due care and attention in respect of the accident. Although this was not conclusive evidence of the fourth defendant's negligence, it is an admissible admission which supports the plaintiff's case and which weighed against the fourth defendant.
>
> The case of *Lim Ah Toh v. Ang Yan Chee & Anor* [1969] 2 MLJ 194 lays down the same proposition of law, namely that the plea of guilt to the charge of inconsiderate driving is an admissible evidence. Must I therefore accept the fact that the respondent plaintiff was charged under section 43 of the Road Transport Act 1987 as an admissible admission? Surely this piece of evidence would be an admissible admission which weighs against the respondent plaintiff bearing in mind that the charge under section 43 of the Road Transport Act 1987 must have been instituted with the concurrence of the Deputy Public Prosecutor. The trial court too failed to take into account that the police report that was lodged by the driver of the motor lorry – the first appellant defendant, was made 30 minutes after the accident with hardly any opportunity to concoct or fabricate. In the police report the first appellant defendant briefly said that he gave a light signal to turn to the right

A and as he was negotiating the turn, suddenly a motorcycle that came from the direction of the rear overtook and collided into the front tyre of the motor lorry. The motorcycle fell and he stopped his motor lorry and he saw the motorcyclist was lying on the side of the road. The version of the first appellant defendant in the police report tallied in material particulars with his testimony in court before the trial court. Clearly this was not the case where the first appellant defendant omitted to mention certain relevant facts in his police report. This was in fact the case of the first appellant defendant mentioning relevant facts in his police report.

[112] And by way of an analogy in *Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu (supra)*, I made reference to *Chock Kek Ling v. Patt Hup Transport Co. Ltd. & Ors.* [1965] 1 LNS 25, a decision of the High Court by Raja Azlan Shah J (as His Majesty then was). And I too made reference to the case of *Lim Ah Toh v. Ang Yau Chee & Anor.* [1969] 2 MLJ 194, another decision of the High Court by Raja Azlan Shah J (as His Majesty then was).

[113] In *Chock Kek Ling v. Patt Hup Transport Co. Ltd. & Ors. (supra)*, evidence was led to show that the fourth defendant had pleaded guilty to driving without due care and attention in respect of the accident and that was considered as an admissible admission which supported the plaintiff's case and weighed against the fourth defendant.

[114] In *Lim Ah Toh v. Ang Yau Chee & Anor. (supra)*, the plea of guilty by the first defendant to a charge of inconsiderate driving was held to be an admissible admission which supported the plaintiff's case and weighed heavily against the defendants.

[115] Harun Hashim SCJ delivering the judgment of the Supreme Court in *Chang Chong Foo & Anor v. Shivanathan Perumal* [1992] 4 CLJ 1939; [1992] 1 CLJ (Rep) 27 SC, was concerned with the trial judge's admission of the fact that the defendant had pleaded guilty to a charge of dangerous driving and his Lordship held that what the trial judge did was proper. In arriving at this decision, his Lordship applied the decisions of *Chock Kek Ling v. Patt Hup Transport Co. Ltd. & Ors. (supra)* and *Lim Ah Toh v. Ang Yau Chee & Anor (supra)*.

[116] In *Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu (supra)*, I posed a germane question and that was:

> Must I therefore accept the fact that the respondent plaintiff was charged under section 43 of the Road Transport Act 1987 as an admissible admission?

[117] I answered the question posed in the positive. That was another step in the development of the law – a judicial activism of a sort. The law cannot remain still. It has to develop from time to time. When you talk of evidence, you are making reference to information. It is correct to say that information provides grounds for belief that a particular fact or a set of facts as true. W.M. Best in *"A Treatise on the Principles of the Law of Evidence, with Elementary Rules for Conducting the Examination and Cross-Examination of Witnesses"* (3rd edn, London: H. Sweet 1860) wrote:

> (Evidence is) ... any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or dissaffirmative, of the existence of some other matter of fact.

[118] It is true that the rider of the motorcycle was summoned to appear before the Magistrate's court for an offence under s. 43(1) of the Road Transport Act 1987. It is true that the summons was unserved. It is true that the rider of the motorcycle was absent before the Magistrate's court and a warrant for his arrest was issued. It is true that the warrant of arrest could not be effected because the rider of the motorcycle has moved house. It is true that the summons is still pending and it has not been withdrawn. All these are the preliminaries before the rider of the motorcycle is finally brought to court. And all these preliminaries are relevant evidence. I must reiterate that relevant evidence is *prima facie* evidence which cannot be swept under the carpet. It is my judgment that the learned sessions court judge had erred in law when he failed to take into account all these preliminaries which when taken together would heavily favour the driver of the motor lorry – the first defendant respondent herein.

[119] A charge was preferred against the rider of the motorcycle under s. 43(1) of the Road Transport Act 1987. SP1 – the assistant investigating officer, had no power to prefer the charge under s. 43(1) of the Road Transport Act 1987 against the rider of the motorcycle. SP1 testified that (see p. 81 of the appeal record):

> Lepas penunggang motosikal buat report, saya dapati penunggang motosikal dikeluarkan saman bawah seksyen 43(1) Akta Pengangkutan Jalan 1987.

[120] The power to prosecute is vested in the Public Prosecutor. The Attorney-General is the Public Prosecutor. In his absence or inability to act, the Solicitor-General shall act as the Public Prosecutor. The constitutional power of the Public Prosecutor over criminal proceedings is confined to the Civil Courts and does not extend to the Syariah Courts (*Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1998] 4 CLJ 538).

[121] It is impossible for the Public Prosecutor to carry out his manifold duties. Thus, we see the situation where he has appointed officers or persons to assist him or to act as his deputies in the performance of any of the functions or duties of the Public Prosecutor under the Criminal Procedure Code or under any written law and may assign to them their functions and duties. So, it can be surmised that it was the Deputy Public Prosecutor who has directed the rider of the motorcycle to be charged under s. 43(1) of the Road Transport Act 1987.

Conclusion

[122] For the reasons adumbrated above, I must dissent from the majority. I say that the decision in *Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu (supra)* was correctly decided. Relevance, admissibility and weight of the evidence dictate the reception of the evidence surrounding the charge under s. 43(1) of the Road Transport Act 1987 against the rider of the motorcycle. That charge is still pending and has not been withdrawn. No compromise can be made as to its admissibility. The appeal must therefore be dismissed with costs. The decision of the learned sessions court judge in regard to the issue of liability is hereby set aside. The decision of the learned High Court judge in regard to the issue of liability is hereby affirmed. Deposit should rightly go to the defendants respondents on account of taxed costs.